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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 412

DOMINICK S. FAGO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 27, 1963.

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No. ____

DOMINICK S. FAGO, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on June 28, 1963.

CITATION TO OPINION BELOW

The per curiam opinion of the Court of Appeals, affirming the conviction of the petitioner, was rendered on June 28, 1963, but has not yet been reported. It is reprinted in Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1963. On July 25, 1963, Mr. Justice Harlan signed an order extending the time for filing this petition for a writ of certiorari to and including August 28, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether documentary evidence acquired by federal revenue agents, in collaboration with state agents, in violation of a state law imposing a "seal of secrecy" on state grand jury records must, in terms of the proper administration of criminal justice in federal courts, be excluded from a subsequent criminal trial in a federal district court.

STATUTORY PROVISIONS INVOLVED

Involved in this case is Section 952-t of the New York Code of Criminal Procedure, set forth in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner was convicted, following a jury trial in the District Court for the Western District of New York, of violating 26 U.S.C. § 7201 by filing false and fraudulent income tax returns for 1954 and 1955 and of violating 26 U.S.C. § 7203 by failing, as principal officer of two wholly-owned corporations, to file six specified withholding tax returns due in 1955 and 1956. He was sentenced to imprisonment for 18 months and a $10,000 fine on each of the two income tax violations; the sentence on each of the six withholding tax violations was imprisonment for one year and a $5000 fine. The prison sentences were ordered to run con-

currently. The convictions were all affirmed by the Court of Appeals.

The facts relevant to the question now presented for review had their origin in an investigation commenced by the Erie County District Attorney's office relative to corruption among public officials in the City of Lackawanna, N. Y. This investigation began in September or October of 1955 and included inquiries into possible bribery of public officials by individuals or corporations contracting with the City.

Among the contracting corporations were three companies wholly owned by petitioner—John B. Schultz Contracting Co., Nottingham Contracting Corp., and Rosedale Builders, Inc. Petitioner thus was included among the many persons investigated. The target of this inquiry into petitioner's activities "was to establish the money that he had used, as we assumed, to bribe the public officials of the City of Lackawanna. A certain number of cash payments that we were never able to pin down." R. 467-48.

To that end, petitioner on or about May 7, 1956, was served with several subpoenas commanding him to turn over to the Erie County Grand Jury the records of these wholly-owned corporations. Petitioner himself was also subpoenaed to produce his own records and to give testimony. The corporate records were in the hands of petitioner's then attorney, one Hyman Karnofsky. Some time on or after May 23, 1956, following a court order, these records were delivered by Karnofsky under protest to the District Attorney. The grounds of this protest were said by the petitioner to involve a violation of "his privilege against self-incrimination as guaranteed by the Fifth Amendment

of the United States Constitution and Article I, Section 6 of the New York State Constitution and the Client Attorney Privilege." R. 1621.[1]

On June 19, 1956, the District Attorney specifically requested Karnofsky to deliver, on behalf of his clients, certain additional records including "individual employees' records showing deductions and withholdings from the individual employees' pays". R. 1648.

On or about July 17, 1956, petitioner was ordered to appear in person before the Erie County Grand Jury and was informed that he "was being played in the role of a prospective defendant." R. 1620. He thereupon refused to answer any and all questions asked by the District Attorney. Thereafter, petitioner was granted full immunity under § 2447 of the New York Penal Law and was then directed to answer and give testimony concerning the suspected bribery. Petitioner did in fact testify on several occasions pursuant to such direction. R. 1620-1621.

In the meantime, in May of 1956, the Internal Revenue Service began an investigation of the tax liability of one Thomas Panasci and his wife. R. 467-86. Information was developed to the effect that Panasci had worked for certain of the corporations owned by the petitioner herein and that the records of those corporations were in the hands of the Erie County District Attorney.

Then, in the words of Special Agent Kirchner of the Internal Revenue Service, "we were given permission

[1] Petitioner claimed that interspersed among the corporate records "were personal records of defendant in the form of checks, notes and other documents." R. 1621.

[by the District Attorney's office] to examine corporate records of Mr. Fago over at the District Attorney's office several days prior to the time when we issued the summons. They were given to us, his corporate records, pertaining to Mr. Fago." R. 467-89. This examination took place "around September" in 1956. R. 467-92. Kirchner concluded, after this preliminary examination in the District Attorney's office, that he wanted to examine these records "more fully in our office." R. 467-89. He also made known to the District Attorney that he "needed certain other records." R. 467-90. In admitting that he did "tell the District Attorney's office that . . . [he] needed for . . . [his] purposes more records," R. 467-91, Kirchner proclaimed ignorance of whether the District Attorney's office, as a result of his need for more records, thereafter issued other subpoenas to collect additional records. R. 467-91. Kirchner also denied knowledge at this time that petitioner Fago was then under investigation by the Internal Revenue Service. R. 467-96.

The trial transcript reveals, however, that the District Attorney issued various subpoenas duces tecum, returnable before the grand jury, to petitioner personally and to his various corporations not only under date of May 7, 1956, but also under the subsequent date of September 25, 1956. R. 467-76. Subpoenas dated September 25, 1956, were also directed to Karnofsky (the attorney for petitioner) and to Dopkins (the accountant for petitioner), commanding them to produce certain bank checks issued by petitioner's corporations. R. 467-79.

After the preliminary examination of these records in the office of the District Attorney, Special Agent

Kirchner on October 29, 1956, issued and served upon the Erie County District Attorney administrative subpoenas commanding him to produce all books and records in his possession of the three corporations owned by petitioner (Schultz, Nottingham and Rosedale), as well as all records, schedules and work papers furnished by petitioner's accountant, one Leonard B. Dopkins. R. 1639-1642.[2] The District Attorney's office, without notifying the petitioner and without securing any court approval, complied with the subpoenas. In fact, petitioner and his corporations were left totally unaware of the issuance of the subpoenas or of the transfer of the records. And no effort was made by agents of the Internal Revenue Service to secure permission from the appropriate state court to examine or acquire these records. The Internal Revenue Service was thus able at its leisure to examine the records in its own office and to make such photostats as it desired and to make such other use of the records as it saw fit. R. 467-97.

Insofar as federal tax investigations of petitioner or his corporations were concerned, the record reveals that an inquiry was made in 1952 with reference to the withholding tax liability of the K & F Packing and Food Corp., owned by petitioner. R. 467-102. This culminated in a trial in 1956 and the dismissal of the charges against petitioner. R. 467-106. The file concerning the liability of petitioner with reference to the charges underlying the instant case was apparently opened on March 28, 1958. R. 467-17.

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[2] Included among these work sheets and records of the accountant were income tax calculations respecting petitioner and his wife and a copy of their personal tax return. R. 467-29.

Various revenue agents denied that they had been in touch with the Erie County District Attorney's office regarding the instant charges. But Carman F. Ball, who was the First Assistant District Attorney of Erie County in 1956, testified that, as a result of reviewing the Fago records subpoenaed for grand jury purposes, he talked not only to the petitioner himself but also to revenue agents about petitioner's federal tax situation. On a number of occasions he asked petitioner "how do you keep track of this for income tax purposes?" R. 467-54. He also asked petitioner how he could possibly "get away with records like this with the income tax people." R. 467-55.[3] Such conversations occurred both before and after the service of the administrative subpoenas on the District Attorney.

Ball further testified that he talked to an Internal Revenue agent "maybe six, seven times" concerning petitioner's tax situation, saying, in general terms "How in the heck can a person get away with something like that?" R. 467-56, 57.

Petitioner at the trial moved to suppress the various documents and records that the Internal Revenue Service had acquired through the administrative subpoenas directed to the Erie County District Attorney, claiming *inter alia* that such acquisition was in violation of petitioner's rights under "the laws of the United States and the State of New York." R. 1624. A hearing apart from the jury was held with respect to the admissibility of these documents and records.

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[3] Petitioner's response was said to be to the effect that "I don't know, my accountant and attorney took care of that. I don't know anything about the books." R. 467-56.

R. 467-1 to 467-126. The District Judge ruled that these items, which were critical to the prosecution's case, were corporate rather than personal in nature and hence, under the authority of *United States* v. *White*, 322 U.S. 694, petitioner could not assert his personal privilege against self-incrimination so as to suppress these documents. R. 467-124, 125.

In affirming the conviction, the Court of Appeals repeated that petitioner had failed to show that any of the documents were his personal papers rather than records of his wholly-owned corporations.[4] Hence the court felt it must "decline the invitation" of petitioner "to consider large and interesting constitutional questions in regard to cooperation between state and federal officials enabling the latter to obtain indirectly evidentiary material which the Fifth Amendment would prevent them from obtaining directly."

REASONS FOR GRANTING THE WRIT

The judgment below involves a novel and significant issue in the administration of criminal justice in the federal courts, an issue warranting plenary consideration by this Court. Can critical documentary evidence be introduced that was acquired by federal agents, acting in collaboration with state agents, in flagrant violation of state law regarding the secrecy of grand jury proceedings? Is not such evidence as im-

[4] The Court of Appeals dealt with only one item of the alleged personal records—a group of sheets setting forth data as to employees of the Schultz and Nottingham companies for a particular week in 1955. The court held that such a compilation from the records of two corporations would seem, prima facie, to be a record of the two corporations. Petitioner's contention had been that the record had belonged to neither company and that it in fact belonged to him personally.

permissible in a federal trial as that acquired in violation of a federal law or policy and hence excludable under the relevant decisions of this Court? See *Nardone* v. *United States*, 308 U.S. 339; *Wong Sun* v. *United States*, 371 U.S. 471. Because a definitive answer to those important questions has not been supplied by this Court, the grant of certiorari becomes appropriate here so as to enable the formulation of the guidelines for federal courts confronted with similar problems.

The heart of this case is the fact that the documents in question, having been surrendered by petitioner and his corporations solely for purposes of a state grand jury inquiry and then being in the possession of the Erie County District Attorney, were first examined and later subpoenaed by Internal Revenue agents without any judicial authorization. Section 952-t of the New York Code of Criminal Procedure flatly prohibits the copying or taking of grand jury minutes or exhibits[3] without the express written authorization of the appropriate state court. As stated by the New York Court of Appeals in *People ex rel. Hirschberg* v. *Supreme Court*, 269 N.Y. 392, 199 N.E. 634, 635:

> "Such evidence may be made available if the court where the proceedings were had directs that the record of the proceedings and minutes of the evidence may be inspected or produced. Discretion is vested in that court.
>
> "The law requires that the secrecy of the testimony given before the grand jury be kept invio-

[3] The New York courts have interpreted Section 952-t to impose "the seal of secrecy" on both the transcript of testimony before a grand jury and the exhibits or documents submitted to that body. *De Lury* v. *Hogan*, 221 N.Y.S. 2d 566, 568.

> late, except 'upon the written order of the court,' duly made after hearing the district attorney. That can mean only the court in which the proceedings were had and the testimony was taken. The court which had part in the proceedings can best determine whether the seal of secrecy should be broken."

Indeed, so firm is "the seal of secrecy" thus imposed on grand jury records that any entry into the District Attorney's office to view or copy such items, without judicial authorization, is considered "a trespass, and very conceivably criminal." *In re Osborne*, 62 Misc. 575, 117 N.Y.S. 169, 174.

The New York law in this respect reflects the traditional policy respecting grand jury records. From earliest times it has been the policy of the law to shield the proceedings of grand juries from outside scrutiny. *Costello* v. *United States*, 350 U.S. 359, 362. Time and again this Court has referred to and insisted upon "the indispensable secrecy of [federal] grand jury proceedings." *United States* v. *Johnson*, 319 U.S. 503, 513; and see *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 399.[6]

In New York the courts have recognized that, within the discretion and control of the judiciary, grand jury records may be inspected and used by other law enforcement agencies where necessary to facilitate the

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[6] See also *In re Holovachka*, 317 F. 2d 834, 837 (C.A. 7). Such secrecy as to federal grand jury records can be lifted only within the rigidly limited conditions of Fed. Rules Crim. Proc. 6(e). That rule has its counterpart in the provisions of Section 952-t of the New York Code of Criminal Procedure, with respect to the conditions under which state grand jury records may be released to other law enforcement officers.

administration of justice. Such agencies, concerned with matters unrelated to the grand jury inquiry, may obtain permission from court to examine these records upon a proper showing. See *People* v. *Behan*, 37 Misc. 2d 911, 235 N.Y.S. 2d 225. Federal law enforcement officers are among those eligible to seek such judicial permission. *Application of King*, 188 N.Y.S. 2d 249 (federal immigration authorities); *In re Attorney General of the United States*, 160 Misc. 533, 291 N.Y.S. 5 (federal mail fraud prosecutors).

But no such judicial permission was sought or obtained in this case. The Internal Revenue agents simply asked the Erie County District Attorney if they could examine in his office the grand jury documents in question. Not only did he permit that inspection but he proceeded to secure more documents from petitioner's corporations when advised that the agents needed more records for their purposes. And the District Attorney readily complied with the administrative subpoenas so as to permit physical transfer of the documents to the offices of the Internal Revenue agents for more leisurely inspection. Such acquiescence by the District Attorney in no way diluted the violation of Section 952-t, for it was not within the District Attorney's power to permit inspection of the grand jury records by federal officers. Only a state court judge could do that. The District Attorney's actions only underscored the failure to secure judicial consent. The poisonous tree thus took root in both federal and state soil.

The collusive violation of Section 952-t was more than a technical one. To invade "the seal of secrecy" without judicial authorization, however justifiable may be thought the need, is to undermine the consideration

paid by the State of New York for compelling the production of documents under protest. Citizens who are forced to supply records to a grand jury are entitled to rely upon the promise of Section 952-t that the records will be kept inviolate save where a judicial tribunal determines that a countervailing public necessity exists. See *Feldman* v. *United States*, 322 U.S. 487, 493.

The introduction at petitioner's trial of the tainted fruits of this Section 952-t violation poses a critical problem in the administration of federal criminal justice. Had the documents been acquired in a manner outlawed by a federal law or policy, the inadmissibility would have been clear.[7] Petitioner suggests that the same result must follow where the acquisition involves a violation of so important a state policy as that embodied in Section 952-t of the New York Code of Criminal Procedure.

Essentially, the question to be asked here is the same as was asked in *Wong Sun* v. *United States*, 371 U.S. 471, 488, quoting from Maguire, Evidence of Guilt, 221 (1959): ". . . whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." It would seem clear in this case that the documents were "come at by the exploitation of that [state law] illegality." Having acquired the documents unlawfully in connection with the Panasci investigation, the federal agents were in ready position to exploit that illegality when the tax investigation of the petitioner got

[7] Evidence is clearly inadmissible where obtained in violation of the federal Constitution, *Elkins* v. *United States*, 364 U.S. 206, or of a federal statute, *Nardone* v. *United States*, 308 U.S. 338, or of a federal court policy, *McNabb* v. *United States*, 318 U.S. 332.

under way; the records with respect to petitioner were available in the Internal Revenue offices.

Because federal agents were so intimately involved in both the original illegality and the ensuing exploitation, exclusion of the documents at a federal trial does far more than implement the state policy of secrecy respecting grand jury records. It was the failure of the Internal Revenue agents to seek court sanction for inspecting the records that created the breach in the state policy, a breach which those agents fully exploited in their detection of petitioner's tax violations. Such federal involvement in a state law violation in itself raises problems in regard to "federal-state cooperation in criminal investigation." *Elkins v. United States*, 364 U.S. 206, 222. But it also makes exclusion of the tainted evidence a matter of direct concern of the federal courts.[*] Exclusion is the only effective sanction against such lawlessness by federal agents.

Also relevant to the considerations affecting the grant of certiorari is the fact that to the extent to which the federal tax agents used the offices of the Erie County District Attorney and the grand jury as instruments for compelling the production of documentary material in order to detect federal tax violations, the caveat of this Court in *Feldman v. United States*, 322 U.S. 487, 494, becomes controlling:

> "If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, 273 U.S. 28, as well as that of *McNabb v. United States*,

[*] This involvement of federal officers distinguishes the instant situation from that in *Burdeau v. McDowell*, 256 U.S. 465, where the unlawful actions of private individuals in stealing certain documents later given to federal prosecutors and introduced at a federal trial were held not to render the documents inadmissible.

318 U.S. 332, afford adequate resources against such evasive disregard of the privilege against self-crimination."

See also *Knapp* v. *Schweitzer*, 357 U.S. 371, 380; and *Mills* v. *Louisiana*, 360 U.S. 230. Where, as here, the collusive use of the state agency by federal authorities results in an "evasive disregard" of the state seal of secrecy on grand jury records and in the securing of incriminating documents for federal prosecution purposes, the *Feldman* caveat dictates that the documents be excluded.

The answer to these problems in the administration of federal criminal justice is not to be found in the ruling of the Court of Appeals below that petitioner failed to show any of the documents involved were his personal papers rather than the records of his wholly-owned corporations. The intensely personal nature of the privilege against self-incrimination, *United States* v. *White*, 322 U.S. 694, is not the *sine qua non* of the standing to object to the introduction of evidence acquired in violation of federal policy relating to the administration of criminal justice. When a defendant is directly injured by the introduction of such evidence, as the petitioner was here, he has the requisite interest and standing to object, in terms of the relevant federal policy.[1]

[1] "So long as the 'error' violates the Court's standards for conducting judicial proceedings, reversal will usually follow even though the effect on the particular litigant may have been inconsequential or nonexistent. Where there was prejudice to the litigant, he is relieved of the need to demonstrate it; where there was none, he becomes the beneficiary of a gratuitous reversal of an unfavorable verdict because the judicial proceeding happened to be 'improperly conducted.'" Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1657 (1963).

Indeed, to the extent that petitioner was convicted of failing, as principal officer of two wholly-owned corporations, to file withholding tax returns, the Government secured the conviction by means of piercing the corporate veil and imposing, under 26 U.S.C. § 7205, liability on the petitioner for a corporate dereliction. To deny petitioner the right to object to the introduction of these corporate records because of a wall created by the Fifth Amendment between an individual and a corporation is "to permit the Government to have the advantage of contradictory positions as a basis for conviction." *See Jones v. United States*, 362 U.S. 257, 263. The overriding federal policy at stake here precludes maintenance of any such inconsistency.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 371—October Term, 1962

(Argued June 6, 1963 Decided June 28, 1963)

Docket No. 27815

UNITED STATES OF AMERICA, *Appellee*,

v.

DOMINICK S. FAGO, *Appellant*.

Before: CLARK and FRIENDLY, *Circuit Judges* and ZAVATT, *District Judge*.*

Appeal from a judgment of the District Court for the Western District of New York, John O. Henderson, Judge, convicting defendant, after a verdict, for filing false income tax returns and failing, as principal officer of a corporation, to file withholding tax returns. Affirmed.

HERALD P. FAHRINGER, JR. (Lipsitz, Green and Fahringer, Buffalo, New York), *for Appellant*.

EDMUND F. MAXWELL (John T. Curtin, United States Attorney, Buffalo, New York), *for Appellee*.

PER CURIAM:

Dominick Fago appeals from a judgment of the District Court for the Western District of New York convicting him, after a verdict, of violating 26 U.S.C. § 7201 by filing false and fraudulent income tax returns for 1954 and 1955 and of violating 26 U.S.C. § 7203 in failing, as principal officer of John B. Schultz Contracting Co., Inc. and of Nottingham Contracting Corporation, to file six specified withholding tax returns due in 1955 and 1956. Although Fago's brief

* Of the Eastern District of New York, sitting by designation.

urged that the evidence was insufficient to warrant a conviction, this point was not pursued in argument and is wholly without merit. The claim seriously pressed on us was that the convictions were obtained in violation of Fago's rights to be secure against unreasonable searches and seizures and not to be compelled to be a witness against himself, guaranteed by the Fourth and Fifth Amendments.

The claim is that Fago turned his personal and corporate records over to the District Attorney of Erie County, New York, for examination in the latter's investigation of corruption in the City of Lackawanna, under a state grant of immunity; that the state officials permitted the Internal Revenue Service to examine these records; and that thereafter the state officials turned the records over, pursuant to an administrative summons, to the federal authorities investigating Fago's tax liabilities. We are invited to consider large and interesting constitutional questions in regard to cooperation between state and federal officials enabling the latter to obtain indirectly evidentiary material which the Fifth Amendment would prevent them from obtaining directly. We must decline the invitation. For, apart from the fact that the records came into the possession of the New York authorities for a purpose wholly unrelated to the subsequently initiated federal inquiry, Fago failed to show that the documents were his personal papers rather than records of the corporations, which he could himself have been compelled to produce. The only item seriously questioned on this score was a group of sheets setting forth data as to employees of the Schultz and Nottingham companies for a particular week in 1955. But a compilation from the records of two corporations would seem, *prima facie*, to be a record of the two corporations, and Fago offered nothing to overcome this natural inference. His contention that an officer of a corporation cannot be required to produce corporate records which are sought to prove a crime against him runs counter to the teaching—never since questioned by the Supreme Court—

of *Wilson* v. *United States*, 221 U. S. 361, 385 (1911). His claim that the *Wilson* rule is inapplicable when a corporation is a mere *alter ego* of its owner is answered by the portion of *United States* v. *Guterma*, 272 F. 2d 344, 346 (2 Cir. 1959), relating to Chatham Corporation, and the authorities there cited.

Affirmed.

APPENDIX B

Section 952-t, New York Code of Criminal Procedure

§ 952-t. Stenographers' duties

It shall be lawful for any stenographer duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand or upon a typwriting machine the testimony introduced before such grand juries, and, except when his original notes and minutes and the exhibits pertaining thereto have been impounded as hereinafter provided for, to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney provided, however, that the judge presiding over the term of court for which any grand jury is drawn, may at any time during the sitting of such grand jury and upon petition signed by its foreman or acting foreman and certified by its clerk to have been authorized by twelve or more of the grand jurors constituting such grand jury, impound the stenographer's original notes and minutes and the exhibits pertaining thereto or any portion of such original notes, minutes, and exhibits, and may order them to be delivered to him and placed in his custody or in the custody of a public officer

named by him. When so impounded, such original notes, minutes, and exhibits shall not be taken from the custody of such judge or such public officer except upon the order of such judge, who, upon the written requisition of the foreman or acting foreman of such grand jury, shall deliver them or order them to be delivered to such foreman or action[1] foreman for use in the grand jury room during the hours when the grand jury is actually in session. Except as above provided, all of the said original notes and minutes shall be kept in custody of said district attorney, and neither the same, nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney, excepting as above provided. Nothing contained in this section, however, shall be construed to prohibit a grand jury from inspecting its own minutes and exhibits while in session. Added L.1909, c. 66, § 4; amended L.1941, c. 914, § 1, eff. Sept. 1, 1941.

[1] So in original. Probably should read "acting".

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DOMINICK S. FAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. 1a-3a)[1] is reported at 319 F. 2d 791.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1963. On July 25, 1963, an order was signed by Mr. Justice Harlan extending the time to file a petition for a writ of certiorari to August 26, 1963. The petition was filed in this Court on August

[1] "Pet." refers to the petition for certiorari. "R." refers to petitioner's appendix in the court of appeals. "Supp. R." refers to the government's appendix in that court.

27, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court committed reversible error during petitioner's trial for tax evasion when it allowed certain corporate records into evidence without determining whether their disclosure to federal agents by a State district attorney had violated the State's rules regarding the secrecy of grand jury proceedings.

STATUTE INVOLVED

Code of Criminal Procedure, 66 McKinney's Consolidated Laws of New York Annotated (Part 3):

§ 952-t. *Stenographers' duties*

It shall be lawful for any stenographer duly appointed and qualified as hereinbefore provided, to attend and be present at the session of every grand jury impaneled in the county in which he is appointed, and it shall be his duty to take in shorthand or upon a typewriting machine the testimony introduced before such grand juries, and, except when his original notes and minutes and the exhibits pertaining thereto have been impounded as hereinafter provided for, to furnish to the district attorney of such county a full copy of all such testimony as such district attorney shall require, but he shall not permit any other person to take a copy of the same, nor of any portion thereof, nor to read the same, or any portion thereof, except upon the written order of the court duly made after hearing the said district attorney provided, however, that the judge presiding over the term of court for which any grand jury is

drawn, may at any time during the sitting of such grand jury and upon petition signed by its foreman or acting foreman and certified by its clerk to have been authorized by twelve or more of the grand jurors constituting such grand jury, impound the stenographer's original notes and minutes and the exhibits pertaining thereto, or any portion of such original notes, minutes, and exhibits, and may order them to be delivered to him and placed in his custody or in the custody of a public officer named by him. When so impounded, such original notes, minutes, and exhibits shall not be taken from the custody of such judge or such public officer except upon the order of such judge, who, upon the written requisition of the foreman or acting foreman of such grand jury, shall deliver them or order them to be delivered to such foreman or action [*sic*] foreman for use in the grand jury room during the hours when the grand jury is actually in session. Except as above provided, all of the said original notes and minutes shall be kept in custody of said district attorney, and neither the same nor a copy of the same, or any portion of the same, shall be taken from the office of said district attorney, excepting as above provided. Nothing contained in this section, however, shall be construed to prohibit a grand jury from inspecting its own minutes and exhibits while in session. Added L. 1909, c. 66, § 4; amended L. 1941, c. 914, § 1, eff. Sept. 1, 1941.

STATEMENT

After trial by jury in the United States District Court for the Western District of New York, peti-

tioner was convicted of filing false and fraudulent individual income tax returns for 1954 and 1955, and, as principal officer of two corporations, of failing to file six withholding tax returns due in 1955 and 1956 (26 U.S.C. 7201, 7203) (R. 3–4). The court of appeals unanimously affirmed his conviction (Pet. 1a–3a).

In this Court petitioner does not challenge the sufficiency of the evidence to sustain his conviction. Concisely stated, the evidence introduced at the trial demonstrated that petitioner had diverted funds to his personal use from the three wholly-owned corporations, and that those receipts were not reflected on his individual income-tax returns. It also showed that employees' income taxes were withheld by two of these corporations, but that the corporations filed no withholding tax returns for the years in question (Supp. R. 90–99).

Petitioner's sole contention in this Court relates to the admission into evidence of the three corporations' payroll records, cash receipts and disbursements journals, accountants' work papers, and computations of wages, social security and withholding taxes.[2] The facts relating to the means whereby these documents were obtained were brought out in the course of a hearing on petitioner's motion to suppress their use as evidence (R. 15–21), and they may be briefly summarized:

In the fall of 1955, the district attorney of Erie County, New York, began a grand jury investigation

[2] A list of the exhibits which are the subject of this contention appears at Supp. R. II–IV.

into alleged corruption among public officials in the City of Lackawanna (Supp. R. 7–8). One of the subjects under investigation was a road-paving contract which involved the three corporations owned by petitioner. The district attorney had reason to believe that bribe payments to public officials had been made from the amounts owing under the paving contract (Supp. R. 11). Subpoenas duces tecum were thereupon issued to petitioner and to his attorney, requiring them to produce the books and records of these corporations for inspection by the State grand jury (Supp. R. 11–12). Petitioner was also subpoenaed to testify before the grand jury. When he invoked the privilege against self-incrimination during his personal appearance, he was granted immunity from prosecution (New York Penal Law § 2447) and compelled to testify.

On or about May 22, 1956—after the State grand jury had subpoenaed the records of petitioner's corporations—August Kirchner, an Internal Revenue agent, was assigned to investigate the tax liabilities of one Thomas Panasci (Supp. R. 16–17). Agent Kirchner learned from Panasci's wife that Panasci had been employed by petitioner's corporations (Supp. R. 19), and he was informed by newspaper publicity that the State grand jury had subpoenaed the books and records of certain of these corporations (Supp. R. 18). An assistant district attorney who was assigned to the grand jury investigation was granted permission, upon request, to examine Panasci's books and records while they were in the custody of Agent Kirchner (Supp. R. 17). This ex-

amination took place in September and October 1956 (Supp. R. 23).

On September 25, 1956, the State district attorney issued additional subpoenas duces tecum to petitioner and to his attorney, requiring them to produce certain checks issued by petitioner's wholly owned corporations (Pet. 5). Approximately one month thereafter, on October 29, 1956, Agent Kirchner subpoenaed, under 26 U.S.C. 7602, the corporate records which were in the possession of the State grand jury pursuant to his assigned duty to investigate unreported income received by Panasci (Supp. R. 22, 23). The records were examined by Agent Kirchner at the district attorney's office on several occasions between November 26 and December 4, 1956, and they were subsequently delivered to Kirchner for photostating on March 18, 1957 (Supp. R. 23). None of petitioner's personal records were examined or copied by Agent Kirchner, nor did he have access to petitioner's testimony before the State grand jury (Supp. R. 2). Throughout his entire investigation Agent Kirchner was assigned solely to investigate Panasci's tax liabilities and he was never involved with petitioner's case (Supp. R. 26). In the course of this investigation he did not request the State district attorney to issue any subpoenas or solicit any other assistance (Supp. R. 2, 26).

The Internal Revenue agent who conducted the investigations which produced the charges against petitioner testified that they were assigned to these duties on December 6, 1956 (the corporate withholding tax investigation) (Supp. R. 26), and on March

28, 1958 (petitioner's personal tax liability investigation) (Supp. R. 6). Neither had any contact with the office of the Erie County district attorney when the corporate records were secured in 1956 (Supp. R. 6, 28). The agent in charge of the withholding tax investigation secured copies of the corporate records from Agent Kirchner after he was unable to obtain the records from the corporations or from petitioner (Supp. R. 30).

Petitioner filed a pre-trial motion to suppress testimony and records allegedly illegally obtained by federal agents from the district attorney of Erie County, claiming a violation of his rights under the Fourth and Fifth Amendments, and of the immunity granted him in connection with his testimony before the State grand jury (R. 13-23). The district court found that only corporate records had been obtained from the State district attorney, and denied the motion (Pet. 8). The court of appeals, noting that "the records came into the possession of the New York authorities for a purpose wholly unrelated to the subsequently initiated federal inquiry," also rejected petitioner's constitutional claim on the ground that the corporate records were beyond the protection of petitioner's privilege against self-incrimination (Pet. 1a-3a).

ARGUMENT

In the district court and in the court of appeals petitioner contended that federal and state authorities had collaborated to deprive him of his constitutional privilege against self-incrimination, and that the exhibits introduced at his trial were fruits of this im-

permissible co-operation. In this Court petitioner has abandoned his constitutional claim and has advanced, for the first time, the argument that the admission of the corporate records into evidence was erroneous—albeit not unconstitutional—because the records were secured by federal agents in violation of a New York statute imposing secrecy on grand jury proceedings. Neither the sole question presented by the petition nor the contention rejected by the courts below requires consideration by this Court.

1. Petitioner's failure to assert his novel argument in the courts below is, in the absence of "exceptional circumstances," fatal to its initial presentation here. *E.g., Lawn* v. *United States*, 355 U.S. 339, 362 n. 16; *Husty* v. *United States*, 282 U.S. 694, 701–702. Petitioner's motion to suppress made no mention of § 952–t of the New York Code of Criminal Procedure. Nor was this provision, or any other New York statute, relied upon or cited in petitioner's brief in the court of appeals. Failure to raise and preserve the issue is not explained in the petition for certiorari by any circumstance, exceptional or otherwise.

2. Moreover, there is no evidence in the record supporting petitioner's speculative assumption that the Erie County district attorney failed to obtain the permission of a state court before revealing the corporate records to Agent Kirchner pursuant to the agent's subpoena. Although the incumbent district attorney (who had been the First Assistant in 1956) testified in detail as petitioner's witness during the hearing on the motion to suppress, he was never

asked whether permission of a state court had been sought before the records were disclosed.

3. Assuming, *arguendo*, that no permission to disclose was obtained from a New York court, petitioner's contention nonetheless fails for other reasons: (1) It is not at all clear from the language and purpose of § 952-t that it would prohibit disclosure of unimpounded grand jury exhibits for purposes other than discovery of matters occurring before the grand jury. On its face, the first part of the New York statute (pp. 2–3, *supra*)—which applies unless the grand jury records are "impounded"—prohibits disclosure of testimony only. And if the State's secrecy policy is similar to that of the federal courts, documents subpoenaed by a grand jury may be disclosed for their "intrinsic value in the furtherance of a lawful investigation," although not "to learn what took place before the grand jury." *United States* v. *Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (C.A. 2). The purpose of the disclosure in the present case was obviously unrelated to the matters pending before the State grand jury. (2) The illegality, if there was any, is not attributable to federal officials. Whatever duty the statute imposes is cast upon the grand jury stenographer and on the district attorney. Those who seek disclosure are surely not required by the New York statute or by any federal policy to police the conduct of State officials in order to insure that they comply with all the statutory formalities. Since there was no prearranged scheme to circumvent the statute, there is no reason to penalize federal officials for the technical

omissions of the State district attorney. (3) The illegality, if there was any, did not prejudice petitioner. Had the district attorney applied to a State court for an order authorizing disclosure of the grand jury exhibits, permission would have been granted. *In re Attorney General of the United States*, 160 Misc. 533, 291 N.Y.S. 5.

4. Finally, there is no merit to petitioner's basic contention that the admissibility of evidence in the federal courts depends on whether it was secured free of any taint of illegality under local law. Such a novel doctrine would subject the rules of evidence in federal trials to the diverse technical requirements produced by local conditions. This Court's supervisory power over the administration of criminal justice in the federal courts requires it to impose exclusionary rules in order to promote compliance with federal statutes or rules of procedure. The same policy may even sustain the exclusion of evidence obtained by federal officials through inherently immoral or lawless conduct. But a technical violation of State law, such as that which may have occurred in the present case, calls for no such extreme sanction.

5. The court of appeals correctly rejected the claim which petitioner has now abandoned—that federal and state officials collaborated to deprive him of his privilege against self-incrimination. Only corporate records were obtained from the State district attorney. These had been subpoenaed and produced without any promise of immunity since they were not within the scope of the privilege against self-incrimination. As the court of appeals observed, they were documents of

a sort which petitioner "could himself have been compelled to produce" (Pet. 2a). *Wilson* v. *United States*, 221 U.S. 361, 385; *United States* v. *Guterma*, 272 F. 2d 344, 346 (C.A. 2); see *United States* v. *White*, 322 U.S. 694, 699. Consequently, there is no basis for contending that their use at petitioner's trial infringed on any constitutionally protected right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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